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No. 86-568

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES A. POTTER,
Appellant,

VS.

BETTY L. ABSHIRE,
Appellee.

On Appeal from the Court of Appeal of California Fifth Appellate District

MOTION TO DISMISS APPEAL

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January 23, 1987

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14pp

QUESTION PRESENTED

Does California Civil Code Section 5124, which allowed for a period of two years, a modification of community property settlements, judgments, or decrees that became final on or after June 25, 1981 and before February 1, 1983 in a manner consistent with pre-*McCarty* and post-FUSFSPA law, contravene constitutional proscriptions.

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INTERVENTION BY CALIFORNIA ATTORNEY GENERAL

Pursuant to 28 USC 2403(b), if the Court determines to consider and hear this Appeal, the California Attorney General should be permitted to intervene as provided in the quoted section, since the constitutionality of a state statute would be called into question. Such certification by the Court to the California Attorney General appears to be required (see *Merrill v. Town of Addison* (1985) 763 F.2d 80, 82-83 (C.A. 2d).

SUCCINCT STATEMENT OF THE CASE

1. Respondent Husband entered the U. S. Navy in July, 1953.

2. Petitioner Wife and Respondent Husband married on April 7, 1961.

3. Respondent Husband retired from the U. S. Navy on February 1, 1978, and began to receive retired pay monthly.

4. The parties separated on April 28, 1981.

5. Petitioner filed her Petition for Dissolution on April 28, 1981, alleging as community property the U. S. Navy Retirement.

6. Respondent filed his Response and Property Declaration to the Petition on May 13, 1981, alleging a community interest in the U. S. Navy Retirement commencing with the date of the 1961 marriage and a separate property interest in such retirement from July, 1953 to the 1961 marriage.

7. *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, was decided on June 26, 1981.

8. Respondent filed an Amended Response and Community Property Declaration on September 21, 1981, now alleging that *all* U. S. Navy Retirement benefits were his separate property.

9. Interlocutory Judgment by Stipulation was heard on October 29, 1981 and entered on November 16, 1981. Paragraph 4 thereof confirmed the retirement benefits presently received by Respondent as his separate property. Paragraph 8 thereof contained a waiver of New Trial and Appeal by the parties.

10. The Final Judgment was entered on November 24, 1981.

11. Congress enacted the Uniformed Services Former Spouses' Protection Act on September 8, 1982, to take effect on February 1, 1983 (96 Stat. 730, Public Law 97-252).

12. The California Legislature enacted Civil Code Section 5124 in 1983 (Stats. 1983, Ch. 775), effective January 1, 1984.

13. Petitioner filed her Motion for a share of the military retirement of Respondent on December 5, 1983 with the hearing initially set for January, 1984.

14. The matter was heard by the Court on March 29, 1984 and the Court rendered its decision on May 31, 1984, declaring Civil Code Section 5124 unconstitutional, thus denying Petitioner a share of Respondent's military retirement. The formal order thereof was entered on June 7, 1984.

15. A Notice of Appeal was filed by Petitioner on June 28, 1984 to the Court of Appeal.

16. The California Court of Appeal, Fifth Appellate District, reversed the trial court decision on March 26, 1986, finding Civil Code Section 5124 to be valid.

17. The California Supreme Court denied Review on July 9, 1986.

THE COURT SHOULD DISMISS THE APPEAL BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND BECAUSE THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Court's ruling in *McCarty v. McCarty* (1981) 453 U.S. 210, wherein the Court disallowed the division as community property the potential military retirement benefits of the military spouse who had served 18 years in the military service prior to separation from his spouse and the filing of a dissolution action, contained the following in the course of the majority opinion:

> "Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Secure Contexts; that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." (453 U.S. 236)

In evident response to the above quoted portion of the *McCarty* opinion, Congress enacted the Federal Uniformed Services Former Spouses' Protection Act (hereafter FUSFSPA) on Septem-

ber 8, 1982, to become effective February 1, 1983 (Public Law 97-252; 96 Stat. 730; 10 USC 1408).

FUSFSPA's "heart" is in 10 USC 1408(c)(1) set forth as follows:

> "(c)(1) Subject to the limitations of this section, a Court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

The *McCarty* case was decided June 26, 1981 so the "after June 25, 1981" reference in the statute manifests a clear intention, in my belief, to legislatively override the *McCarty* decision. Some expressions of "intention" are found in Volume 3, U.S. Code Congressional and Administrative News, 1982, as follows:

> *P. 1599-1600:* "The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply state divorce laws to military retired pay. Former spouses divorced in the interim period between the *McCarty* decision and the effective date of this law will have the opportunity to return to court to have their decrees modified in light of this legislation."
>
> *P. 1611:* "Subsection (c) of section 1408 sets forth several conditions and limitations applicable to court orders served and payments made pursuant to section 1408. Paragraph (1) of subsection (c) provides that, subject to the other limitations of section 1408, a court, as defined by paragraph (1) of subsection 1408(a), may treat the disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as solely the property of the member or as the property of the member and the member's spouse, depending on the law applicable to the court in question. The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the

> date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit state and other courts of competent jurisdiction to apply pertinent state or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision."

California Civil Code Section 5124 was the procedural device adopted by the Legislature to allow an implementation of the sharing of military retirement benefits by the non-service spouse under FUSFSPA where the "settlement, judgment or decree" fell after June 25, 1981 and before February 1, 1983, and to facilitate the retroactivity of FUSFSPA. It contains express language which leaves no doubt as to its intention to apply retroactively. It affects settlements, judgments, and decrees which became final after June 25, 1981 and before February 1, 1983. It was enacted in 1983, to be effective January 1, 1984. It had a "sunset" provision as of January 1, 1986.

California Civil Code Section 5124 reads as follows:

5124.

> (a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981 and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981 and as it has existed since February 1, 1983.

(b) Modification of community property settlements, judgments or decrees under this section may be granted whether or not the property settlement, judgment or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981 and on or after February 1, 1983, was not, as of the date the property settlement, judgment or decree became final, divisible community property.

(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed.

Civil Code Section 5124 would be brought into play via the modification process, which contains the concepts of notice, hearing, and Court discretion, thus assuring a "due process" review and redetermination.

Civil Code Section 5124 essentially encompasses two tiers of "retroactivity" as follows:

1. *Applicability to Settlements-Judgments:* Community property settlements, judgments, and decrees which became final between June 25, 1981 and February 1, 1983.

2. *Applicability to Retirement Benefits:* The division of military retirement benefits to the non-military spouse is only as to those benefits payable on or after February 1, 1983.

Thus, while settlements, judgments, and decrees which became final during the "hiatus period" of June 26, 1981 to February 1, 1983 could be set aside, the benefits to which the former non-military spouse could be entitled flow only from February 1, 1983, according to the express language of Section 5124. I believe that while Congress intended to allow the states to implement procedures to make the benefits "retroactive" as far as June 25, 1981, the California Legislature chose to allow a more limited retroactivity insofar as the receipt of benefits from the former military spouse is concerned, while at the same time allowing "settle-

ments, judgments, and decrees" within the "hiatus period" to be modified appropriately.

By way of contrast, in Texas where no "procedural mechanism" was enacted by the State Legislature, a Texas Court pointed out that FUSFSPA, by itself, does not mandate the reopening and modification of state divorce judgments (*Allison v. Allison* (1985) 690 S.W.2d 340 (Tex. Civ. App.). As the court expressed it:

> "Appellant cites this Court to some of the legislative history of the FUSFSPA stating the purpose of the Act was to allow parties to return to Court. As pointed out earlier in this opinion, the Federal Statute, which is permissive, cannot create the procedural mechanism to reopen final State Court judgments." (690 S.W.2d at 345.)

California Civil Code Section 5124 is not the "Chamber of Horrors" depicted by Appellant in his Jurisdictional Statement (see e.g. p. 28-35). As noted above, Civil Code Section 5124 had a "sunset provision" of January 1, 1986. The "window" has already closed on those affected.

The opinion in *McCarty* recited in clear terms the following:

> "This Court repeatedly has recognized that 'the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States'." (453 U.S. at 221.)

Neither the District Court nor this Court should become "Divorce Courts," thus federalizing yet another area of the law and the lives of its constituency. The several states should continue to be allowed to have control over the status of marriage, custody of minor children, the support of the spouse, and the division of marital property.

The opinion of the California Court of Appeal, attached as Appendix A to the Jurisdictional Statement, and found in 179 C.A.3d 73; 224 Cal. Rptr. 312, eloquently deals appropriately with the issues raised by Appellant.

Some mention should be made of the *Cox* case (*In re Marriage of Cox* (1986) 178 C.A.3d 240; 223 Cal. Rptr. 665). In this California Court of Appeal case, the former wife was denied a share of her former husband's retired pay, on the basis that *McCarty* applied to divorces finalized during the "hiatus period" of June 26, 1981 and February 1, 1983 and that, therefore, Civil Code Section 5124 must "yield" to what the *Cox* court (on a 2-1 decision with a vigorous dissent) believed was the supremacy of *McCarty*.

I am informed that the *Cox* case was "decertified" by the California Supreme Court. As such, under California Rule of Court 977, decertified opinions of the Court of Appeal are not to be cited nor do they have precedential value (see *Faitz v. Reugg* (1981) 114 C.A.3d 967 and *Heaton v. Marin County, etc.* (1976) 63 C.A.3d 421. I understand that *Cox* was before this Court on a Petition for a Writ of Certiorari which was denied by the Court on November 17, 1986 (Case No. 86-283). Justice White, with a concurrence of Justice O'Connor, wrote a dissent which appears in 107 S. Ct. 472.

In short, *Cox* is an aberration that has essentially been removed from recitation as "authority" or "conflict."

CONCLUSION

The only real issue is whether Civil Code Section 5124, together with FUSFSPA, can properly be applied to persons such as Betty L. Potter-Abshire upon the facts of her case. To reject her request to allow her to share in her former husband's vested and matured military retirement (vested and matured *three years before separation*) will create one set of laws and rules for pre-*McCarty* and post-FUSFSPA spouses, and another and opposite set of rules for spouses of retired military veterans like Mrs. Potter-Abshire, simply on the fortituous basis of when their divorce was "final:" that is; between June 25, 1981 and February 1, 1983. Such an anomalous result not only offends equitable principles long embedded in dissolution cases, but exalts the mere timing of an action over the real substance of the action. Both Congress and the California Legislature have properly combined to deal with this issue by the enactment of FUSFSPA and Civil

Code Section 5124. A "window" was fashioned through which former spouses like Mrs. Potter-Abshire may not only view but enjoy the fruits of a military retirement like those who finally divorced before June 26, 1981 or after February 1, 1983. While military personnel may feel that their retirement is "theirs" alone, such is an essentially selfish view since it is common knowledge that during military service, there are separations, frequently moving, relocation of children in school, making new (albeit often temporary) friends, contending with damaged or lost household goods in transit, and "one-parenting" by the wife while her husband is away on lengthy cruises, maneuvers, or other military assignments. Each spouse "pays a price" as a husband serves his country and provides income from his employment therewith for his family. Each spouse looks forward in anticipation of retirement from active military service, and the sharing of the "fruits" from actual retirement.

In this case, Mr. Potter retired and both spouses enjoyed the "fruits of the monthly retirement" until the advent of *McCarty,* which swept away the rights of non-military spouses to a share thereof upon divorce. The result was a "windfall" to Mr. Potter and an inequity to Mrs. Potter-Abshire, a result which Congress and the California Legislature enacted laws quoted herein to correct.

DATED: January 23, 1987.

Respectfully Submitted,

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